IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Court's order whether the case is or not approved for reporting

(Chapter VIII, Rule 32(2) (b)

Description of Case

CRIMINAL APPEAL NO.1317 OF 2001

(Old No. 1763/1992)

Date of decision :-20.02.2006

A.F.R. (Approved for Reporting)

~~Not approved for reporting~~

Date :-20.02.2006 Initials of Judge.

Note :- Bench Reader will attach this at the top of the first page of the judgment when it is put up before the Judge for signature.

HIGH COURT OF UTTARANHCAL AT NAINITAL

CRIMINAL APPEAL NO.1317 of 2001
(Old No. 1763 of 1992)

1. Laxman Singh alias Lachoo
   S/o Mahadeo
2. Mahadev Singh S/o Ratan Singh
   Both R/o Village Kundi,
   Police Station – Devprayag
   District- Pauri Garhwal .....Appellants

Versus

State of Uttaranchal .....Respondent

Dated :-20th February, 2006

Hon'ble J.C.S. Rawat, J.

1. This a criminal appeal against the judgment and order dated 31st August, 1992 passed by Sri Krishna Kumar, the then Sessions Judge, Pauri Garhwal in S.T. Nos. 20 & 21 of 1990 whereby the appellants were convicted u/s 325 read with Section 34, 342 read with 34 I.P.C. and sentenced them to undergo R.I. for a period of two years and one year respectively. Both the sentences were to run concurrently.

2. The prosecution case in a nutshell is that on 25.10.1989, Constable Birendra Singh was on patrol duty on the occasion of Diwali to inquire about gambling etc. Birendra Singh reached at the shop of Laxman Singh-appellant No.1 at 10:30 PM. The Constable-Birendra Singh asked about the dispute of Gram Pradhan on which the appellant-Laxman Singh abused and threatened him. The appellant gave lathi blow to the constable and caused injuries on his body. During the course of marpeet, father of the appellant

Mahadev Singh reached there and both of them caught hold of Birendra Singh and confined him inside the shop. They also looted cash of Rs. 108/- and wrist watch from the constable. They tied the constable Birendra Singh with rope inside the room. On the next day Mahadev Singh went to make arrangement for a vehicle because in the night Laxman Singh-appellant told him that liquor shall be forcibly given to him and he shall be produced before the court of C.J.M. for sending him to jail. In the meantime, S.I. reached there and rescued the constable from the custody of Laxman Singh-appellant No.1.

3. Thereafter, the constable Birendra Singh was brought to the police station where he lodged a written report Ex.Ka.1. On the basis of the written report, a case was registered. The injuries of Birendra Singh were examined. X-ray of the injured was conducted. The investigation was taken up as usual which culminated into the submission of the chargesheet.

4. Charge was framed under sections 333 read with section 34, 342 read with 34 and 394 read with 34 I.P.C. for causing grievous hurt to Constable-Birendra Singh. The appellants denied the Charges and claimed the trial.

5. The prosecution in support of its case examined five witnesses. Shiv Singh Bisht (PW1) was the X-ray Technician. He stated that on 31.10.1989 he took X-ray of left forearm of Birendra Singh. He also proved the X-ray plate Ex.1. Virendra Singh-Court Mouhrir (PW2) has stated that on 25.10.1989 he was posted at Chowki Sabdarkhal of police station Devprayag. He narrated the incident as stated above. Dr. P.N. Uniyal

(PW3) was the Medical Officer, who examined the injuries of Constable Birendra Singh and found the following injuries on the person of the injured :-

i. Traumatic wound 4 x 2 cm. just above the left elbow joint.

ii. Traumatic wound with reddish colour 4 x ½ cm. laceration 11 cm. Below left shoulder joint.

iii. Traumatic wound 8 x 3 cm. Obliquely medical to taterally lower margin of left scapular bone.

iv. Swelling present left hand middle and ring finger dorsal side due to trauma.

v. Traumatic injury with red skin little blood discharge in both legs 10 to 14 cm. Below the left and right patella bone respectively (front side).

vi Bluish skin due to trauma around left eye.

vii. Upper lip swelling is present due to traumatic.

The Medical Officer was opined that the injuries were simple and were caused by some blunt object like lathi and were 13 hours old. He also stated that injured was advised for X-ray. As per the X-ray report, there was fracture corresponding to injury No. 1.

6. The prosecution has also examined Ilam Chand (PW4), who was posted at outpost Sabdarkhal on the relevant date. S.I.-Ajai Dhyani (PW-5) has proved the furd Ex.ka.3, chick FIR ex.ka.4 and copy of G.D. Ex.ka.5. He also investigated the matter initially and recorded the statement of Birendra Singh. Thereafter, the investigation was taken by Sri R.C. Sharma (PW6), who submitted the chargesheet.

7. In the statement recorded u/s 313 Cr.P.C. the appellants denied the prosecution case and stated that they had been falsely implicated in this case.

8. The learned trial court after appraisal of the evidence on record found the appellants guilty and convicted and sentenced them as mentioned above.

9. I have heard Sri. R.P. Nautiyal learned counsel for the parties and Sri G. S. Sandhu learned A.G.A. assisted by Sri Rajeev Mohan learned brief holder. Perused the evidence on record. As per the verification report of the CJM concerned, the appellant No.2-Mahadev Singh has died about two years back. Hence, the appeal against the appellant-Mahadev Singh stands abated.

10. Learned counsel for the appellant contended that the constable-Birendra Singh entered into the house of the appellant forcibly and the prosecution has set up a case that he was on official duty and he went there to enquire about the dispute of Gram Pradhan. On being asked about the cause of dispute, the appellants became annoyed with the constable. Thereafter the constable was beaten by them and was kept inside the house. The learned counsel for the appellant contended that the learned Sessions Judge has held that the constable was not on patrol duty at the relevant point of time and reasons have been given in the impugned judgment of disbelieving the version. It was further contended that the theory of official duty as set up by the prosecution has been disbelieved. Now. the purpose of visit and motive shown by the prosecution becomes unbelievable. Considering the

facts of this case, it can be inferred that the constable went there on his own accord. It was further contended that the prosecution has not given evidence as to why he went to the shop of the complainant. Learned A.G.A. refuted the contention and contended that the constable was on official duty at that time. Perusal of the record reveals that the constable was not on official duty and the finding has become final. I have gone through the said findings recorded by the trial court. I am completely in agreement with these findings recorded by the trial court. No appeal has been preferred against the said finding by the State. Now, it can only be inferred that the constable went at the spot with his own accord. Now, it was for the prosecution to establish as to why he came there. If he was there in the personal capacity, he should have stated the reasons for which purpose he came there. This fact also belies the prosecution version.

11. It has come in the statement of the appellant that the constable Birendra Singh came to the house of appellant in a drunken state and he started kicking on the door by which the door was opened. He was known to the appellant and he was kept inside the room where he was asleep. On the next day, he was taken to chawki and the appellant has been falsely implicated in this case. The defence has put the suggestion to the prosecution witness that the constable Birendra Singh tried to enter into the room of the mother and daughter, which was denied by the witness. Now, it has to be seen whether the explanations submitted by the prosecution are plausible or not. It is for the accused to place necessary facts from the witnesses examined for the prosecution to substantiate the plea.

The accused is not required to call and establish by the plea: the accused can establish his plea by reference to circumstances transpiring from the prosecution evidence itself. The question in such a case would be a question of assessing the true effect of the prosecution evidence, and not a question of the accused discharging any burden. Where a plausible plea has been pleaded, the defence must have a reasonable and probable version satisfying the court that the plea had some bearing supported by the attending circumstances of the case. The burden of the accused stands discharged by showing preponderance of probabilities in favour of that plea on the basis of the material on record. The prosecution had to stand on his own legs and it cannot take the benefit of weakness of the defence. In the instant case, the first circumstance which goes against the prosecution is that the constable Birendra Singh was not on duty and there was no explanation why he went inside the house of the appellants. As such, the appellant was justified in causing the harm to him.

12. The second circumstance which goes against the prosecution is that the prosecution has set up the case that the constable Birendra Singh and Ilam Chand (PW4) were posted at Sabdarkhal out-post and there was no other constable or S.I. It is also in the evidence that Ilam Chand (PW4) came to know that Birendra Singh-constable had been detained by the appellants. He has stated in his cross examination that he tried to rescue him with the help of the villagers, but nobody came forward as the appellant had criminal history. He further stated in his cross examination that he also went to the Gram Pradhan, who did not help him.

Learned counsel for the defence contended that the incident took place in the hill area and the village is also situated in the hill terrain. If any occurrence would have occurred in the village, all the villagers would have come definitely to rescue the detained person. The evidence of Elam Chand (PW4) that no village came to rescue them as Laxman Singh-appellant had criminal history. The prosecution had not produced any evidence that the appellant had criminal history. This fact itself shows that the explanation given by Elam Chand (PW4) is not reliable. It was further contended that this fact shows that the incident did not take place. Learned counsel for the defence contended that the Gram Pradhan who had enmity as stated by the prosecution did not help the constable. This fact further shown that the whole story is concocted. It was further contended that the prosecution version is totally unbelievable and incredible. Perusal of the record transpires that Gram Pradhan had an enmity with the appellant and it would have been the natural conduct of the gram pradhan to rescue constable Birendra Singh. The story as set up by the prosecution does not convince me that nobody came forward to rescue him. Even if the villagers did not come to the house of the appellant, it would have been the natural conduct of the villagers that they would have come to assist Ilam Chand (PW4) to approach to the police station. Therefore, I find force in the contention of the learned counsel for the appellant.

13. The third factor which creates a doubt about the prosecution story is that Ilam Chand (PW4) did not go to the police station in the night. He started to proceed

to the police station in the morning at about 5 AM. The incident took place at about 10:30 PM. According to the FIR, the distance is 22Km between the police station and the police out-post. It is also in the evidence that when he was on the way to the police station, S.I. Ajai Dhyani (PW5), who was on patrol duty, met him near about 2km from the police out-post alongwith the police force. It is also in the evidence that he narrated the incident to the police party. Thereafter, all the police personnel reached the house of the appellant and recovered the constable Birendra Singh from there. The learned counsel for the appellant contended that the prosecution had set up the theory that the police party was on patrol duty. If it was so the prosecution could have established the fact by producing the G.D. The prosecution has not produced the G.D. by which the police party proceeded on patrol duty. Non-production of G.D. creates a doubt whether the police party was on patrol duty or not. It is pertinent to mention here that the incident took place in the hill area and two constables were in the police chowki and S.I. alongwith so many police personnel rushed towards the police out-post. It further reveals that the police party has some knowledge about the incident and they proceeded towards the spot. This fact also creates a dent on the prosecution story and it makes the prosecution story unbelievable.

14. The other factor which makes the evidence of the prosecution doubtful is that the police party proceeded at the spot and the furd was prepared. Perusal of the furd reveals that the constable Birendra Singh was not tied up in the house of the appellant. No detailed furd has been prepared. The furd did not contain that there

were any injury on the person of Constable Birendra Singh. If injuries would have been on the person of constable, it would have been filled in the furd. It has not alleged in the furd that at what place of the room the constable was recovered. Map of the incident has not been prepared. The prosecution kept the evidence silent. Learned counsel for the appellant contended that the non-mention of above fact in the furd shows that the constable was found in the house of the appellant and the police tried to save him by fabricating the case against the appellant. Perusal of the record reveals that the furd does not contain any details as indicated above. The copy of the furd was not given to the appellant at the spot and later on an endorsement was made to this effect that the copy was handed over to the appellant by different writing. It shows that no furd was prepared at the spot. This fact also creates a doubt about the veracity of the prosecution evidence.

15. Another factor which is also relevant to mention here is that the report was lodged by the PW2 Birendra Singh. The prosecution has not filed the General Diary (G.D.) by which the constable was brought to the police station to show how many injuries were on his person. It shows that the entire story is not credible and cogent.

16. Learned trial court has also held that the uniform was not produced by the prosecution and there was so many discrepancies that it is hardly to believe that at the time of the occurrence the constable Birendra Singh was found in his uniform(dress) and the said dress was in torn condition. He has further observed that the constable has stated that the accused persons have

torn his dress, but he has not stated in evidence that the dress was taken from his body and he was made nude by the appellant. The torn dress was not taken into custody by the S.I. Ajai Dhyani (PW5). It has not come in the evidence that at what place the constable was made nude. The said torn uniform was not taken into possession by S.I. Ajai Dhyani (PW5) at the spot. He has not mentioned that he was wearing the uniform or not. Birendra Singh had stated he was nude. It is in the evidence that the dress was handed over to the I.O. by Birendra Singh after about 15 days. It is not in the evidence that how Birendra Singh got the uniform from the appellant. This fact also belies the prosecution version.

17. In view of the above discussion, I am of the view that the prosecution has not established the guilt beyond any reasonable doubt against the appellant. I find that the learned trial court has erred in convicting and sentencing the appellant. Hence, the appeal is allowed and the conviction and sentence against the appellant awarded by the trial court are set aside. The appellant-Laxman Singh is acquitted from the charges levelled against him. He is on bail. He need not surrender. His bail bonds are cancelled and sureties discharged.

18. Let the lower court record be sent back to the court concerned.

(J.C.S. Rawat, J.)

Dated 20.02.2006

LSR